UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

DAMEIN HAMER,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	No. 18-1087-JDT-cgc
	)	
HENDERSON COUNTY, ET AL.,	)	
	)	
Defendants.	)	

ORDER TO MODIFY THE DOCKET,
GRANTING MOTIONS TO AMEND (ECF Nos. 7 & 8),
DISMISSING COMPLAINT AND GRANTING LEAVE TO FURTHER AMEND

On May 9, 2018, Plaintiff Damein Hamer, who is incarcerated at the Henderson County Justice Center (Jail) in Lexington, Tennessee, filed a *pro se* civil complaint and a motion to proceed *in forma pauperis*. (ECF Nos. 1 & 2.) The Court issued an order on September 25, 2018, granting leave to proceed *in forma pauperis* and assessing the civil filing fee pursuant to the Prison Litigation Reform Act (PLRA), 28 U.S.C. §§ 1915(a)-(b). (ECF No. 6.)

Hamer's complaint consists of only one page, and it appeared that he had neglected to sign the document. However, Hamer actually attached the page containing his prayer for relief and the signature block out of order so that when the case was opened that page was inadvertently docketed as part of the motion to proceed *in forma pauperis*. The Clerk

is DIRECTED to re-docket page three of the *in forma pauperis* affidavit, the prayer for relief and signature block, as page two of Hamer's complaint.

Hamer subsequently filed two motions to amend the complaint. On May 23, 2018, he filed a motion seeking to add Quality Correctional Healthcare, the provider of medical services for the Jail, as a Defendant and to amend his prayer for relief to increase the amount demanded as damages. (ECF No. 7.) Hamer filed a second motion on July 25, 2018, to add Hardeman County, Tennessee, as a Defendant[1] and to include as an exhibit a copy of a grievance. (ECF No. 8.) Both motions to amend are GRANTED. The Clerk shall record the Defendants as Henderson County; Henderson County Sheriff Brian Duke; Jail Administrator Lieutenant Jackie Bausman; Quality Correctional Healthcare; and Hardeman County.

Hamer alleges in his complaint that he has serious tooth pain from his braces and bands. He requested dental care repeatedly but received no response and has been given no treatment. Hamer was told by the medical supervisor, identified only as Luke,[2] that it is up to the Jail and Defendant Bausman to make him a dental appointment. Luke spoke to Bausman about Hamer's request, but Bausman had not discussed the issue with Hamer. At some point, he filed a grievance but received no response from Bausman. (ECF No. 1.)

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[1] Although Plaintiff also sought to add the Hardman County Justice Complex as a Defendant, any claims against the Justice Complex are not separate but must be treated as claims against Hardeman County itself.

[2] It does not appear that Hamer intends to sue this individual.

On May 18, 2018, Hamer's "brace bracket chip[p]ed [his] tooth as it broke off," but he alleges he still received no dental care. (ECF No. 7 at 1.) Bausman called Hamer to her office on June 22, 2018, to discuss a grievance he had filed three days earlier. (ECF No. 8 at 1; ECF No. 8-1.) Bausman allegedly told Hamer that Henderson County was housing him for Hardeman County and that it was Hardeman County's responsibility to provide him with dental care. She further advised that if Hamer was taken to the dentist by Henderson County, he would be responsible for payment of those services. (ECF No. 8 at 1.)[3] He alleges the lack of dental care amounts to deliberate indifference. (ECF No. 1.)

The Court is required to screen prisoner complaints and to dismiss any complaint, or any portion thereof, if the complaint—

> (1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or
>
> (2) seeks monetary relief from a defendant who is immune from such relief.

28 U.S.C. § 1915A(b); *see also* 28 U.S.C. § 1915(e)(2)(B).

In assessing whether the complaint in this case states a claim on which relief may be granted, the standards under Federal Rule of Civil Procedure 12(b)(6), as stated in *Ashcroft v. Iqbal*, 556 U.S. 662, 677-79 (2009), and in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-57 (2007), are applied. *Hill v. Lappin*, 630 F.3d 468, 470-71 (6th Cir. 2010). The Court accepts the complaint's "well-pleaded" factual allegations as true and then

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[3] In Bausman's written response to Hamer's grievance, she stated Hardeman County was unwilling to send Hamer to the dentist and that "I will have to ask the Captain about setting an appt that [Hamer] will be responsible for paying." (ECF No. 8-1.)

determines whether the allegations "plausibly suggest an entitlement to relief.'" *Williams v. Curtin*, 631 F.3d 380, 383 (6th Cir. 2011) (quoting *Iqbal*, 556 U.S. at 681). Conclusory allegations "are not entitled to the assumption of truth," and legal conclusions "must be supported by factual allegations." *Iqbal*, 556 U.S. at 679. Although a complaint need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2), Rule 8 nevertheless requires factual allegations to make a "'showing,' rather than a blanket assertion, of entitlement to relief." *Twombly*, 550 U.S. at 555 n.3.

"*Pro se* complaints are to be held 'to less stringent standards than formal pleadings drafted by lawyers,' and should therefore be liberally construed." *Williams*, 631 F.3d at 383 (quoting *Martin v. Overton*, 391 F.3d 710, 712 (6th Cir. 2004)). *Pro se* litigants, however, are not exempt from the requirements of the Federal Rules of Civil Procedure. *Wells v. Brown*, 891 F.2d 591, 594 (6th Cir. 1989); *see also Brown v. Matauszak*, 415 F. App'x 608, 612, 613 (6th Cir. Jan. 31, 2011) (affirming dismissal of *pro se* complaint for failure to comply with "unique pleading requirements" and stating "a court cannot 'create a claim which [a plaintiff] has not spelled out in his pleading'" (quoting *Clark v. Nat'l Travelers Life Ins. Co.*, 518 F.2d 1167, 1169 (6th Cir. 1975))).

Hamer's complaint is filed on the form used for commencing actions pursuant to 42 U.S.C. § 1983, which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable

> to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

To state a claim under § 1983, a plaintiff must allege two elements: (1) a deprivation of rights secured by the "Constitution and laws" of the United States (2) committed by a defendant acting under color of state law. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150 (1970).

The complaint contains no factual allegations of wrongdoing against Quality Correctional Healthcare or Sheriff Duke. When a complaint fails to allege any action by a defendant, it necessarily fails to "state a claim for relief that is plausible on its face." *Twombly*, 550 U.S. at 570.

Furthermore, Hamer has no claim against Defendant Duke merely because of his position as Sheriff. Under § 1983, "[g]overnment officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*." *Ashcroft v. Iqbal*, 556 U.S. at 676; *see also Bellamy v. Bradley*, 729 F.2d 416, 421 (6th Cir. 1984). Thus, "a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Iqbal*, 556 U.S. at 676.

> There must be a showing that the supervisor encouraged the specific incident of misconduct or in some other way directly participated in it. At a minimum, a § 1983 plaintiff must show that a supervisory official at least implicitly authorized, approved or knowingly acquiesced in the unconstitutional conduct of the offending subordinates.

Bellamy, 729 F.2d at 421 (citation omitted). A supervisory official, who is aware of the unconstitutional conduct of his subordinates, but fails to act, generally cannot be held liable in his individual capacity. *Grinter v. Knight*, 532 F.3d 567, 575-76 (6th Cir. 2008);

Gregory v. City of Louisville, 444 F.3d 725, 751 (6th Cir. 2006). A failure to take corrective action in response to an inmate grievance or complaint does not supply the necessary personal involvement for § 1983 liability. *See George v. Smith*, 507 F.3d 605, 609-10 (7th Cir. 2007) ("Ruling against a prisoner on an administrative complaint does not cause or contribute to the [constitutional] violation. A guard who stands and watches while another guard beats a prisoner violates the Constitution; a guard who rejects an administrative complaint about a completed act of misconduct does not."). The complaint in this case does not allege that Defendant Duke, through his own actions, violated Hamer's rights.

Hamer also has not stated a claim against Henderson County or Hardeman County. A local government such as a municipality or county "cannot be held liable solely because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory." *Monell v. Dep't. of Soc. Serv.*, 436 U.S. 658, 691 (1978) (emphasis in original); *see also Searcy v. City of Dayton*, 38 F.3d 282, 286 (6th Cir. 1994). A municipality cannot be held responsible for a constitutional deprivation unless there is a direct causal link between a municipal policy or custom and the alleged constitutional deprivation. *Monell*, 436 U.S. at 691-92; *Deaton v. Montgomery Co., Ohio*, 989 F.2d 885, 889 (6th Cir. 1993). To demonstrate municipal liability, a plaintiff "must (1) identify the municipal policy or custom, (2) connect the policy to the municipality, and (3) show that his particular injury was incurred due to execution of that policy." *Alkire v. Irving*, 330 F.3d 802, 815 (6th Cir. 2003) (citing *Garner v. Memphis Police Dep't*, 8 F.3d 358, 364 (6th Cir. 1993)). The policy or custom "must be 'the moving force of the constitutional violation' in order to establish the liability of a government body under

§ 1983." *Searcy*, 38 F.3d at 286 (quoting *Polk Co. v. Dodson*, 454 U.S. at 326 (citation omitted)). Hamer does not allege that he suffered an injury because of an unconstitutional policy or custom of Henderson County or Hardeman County.

The only remaining claim is against Defendant Bausman for deliberate indifference to Hamer's need for dental care. The Court reviews such claims under the Eighth Amendment, which prohibits cruel and unusual punishments. *See generally Wilson v. Seiter*, 501 U.S. 294, 297 (1991). Under *Estelle v. Gamble*, 429 U.S. 97, 104 (1976), "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain,'. . . proscribed by the Eighth Amendment." However, not "every claim by a prisoner that he has not received adequate medical treatment states a violation of the Eighth Amendment." *Estelle*, 429 U.S. at 105. "In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend 'evolving standards of decency' in violation of the Eighth Amendment." *Id*. at 106.

An Eighth Amendment claim consists of both objective and subjective components. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994); *Hudson v. McMillian*, 503 U.S. 1, 8 (1992); *Wilson*, 501 U.S. at 298. The objective component of an Eighth Amendment claim based on a lack of medical care requires that a prisoner have a serious medical need. *Blackmore v. Kalamazoo Cnty.*, 390 F.3d 890, 895 (6th Cir. 2004); *Brooks v. Celeste*, 39 F.3d 125, 128 (6th Cir. 1994). "[A] medical need is objectively serious if it is 'one that has been diagnosed by a physician as mandating treatment *or* one that is so obvious that even a lay

person would readily recognize the necessity for a doctor's attention.'" *Blackmore*, 390 F.3d at 897; *see also Johnson v. Karnes*, 398 F.3d 868, 874 (6th Cir. 2005).

To establish the subjective component of an Eighth Amendment violation, a prisoner must demonstrate that the official acted with the requisite intent, that is, that he had a "sufficiently culpable state of mind." *Farmer*, 511 U.S. at 834; *see also Wilson*, 501 U.S. at 302-03. The plaintiff must show that the prison officials acted with "deliberate indifference" to a substantial risk that the prisoner would suffer serious harm. *Farmer*, 511 U.S. at 834; *Wilson*, 501 U.S. at 303; *Dominguez v. Corr. Med. Servs.*, 555 F.3d 543, 550 (6th Cir. 2009); *Woods v. Lecureux*, 110 F.3d 1215,1222 (6th Cir. 1997). "[D]eliberate indifference describes a state of mind more blameworthy than negligence." *Farmer*, 511 U.S. at 835. A prison official cannot be found liable under the Eighth Amendment unless he subjectively knows of an excessive risk of harm to an inmate's health or safety and disregards that risk. *Id.* at 837. "[A]n official's failure to alleviate a significant risk that he should have perceived but did not" does not amount to cruel and unusual punishment. *Id.* at 838.

Hamer fails to state an Eighth Amendment claim against Defendant Bausman. He alleges only that he requested dental care because of pain from his braces, that he filed a grievance to which Bausman did not respond, and that he filed another grievance which she discussed with him personally. With the exception of the broken bracket which chipped his tooth, Hamer does not set forth in any detail the problems his braces are causing. Bausman is not a dental provider, and Hamer does not allege that she or any other

individual knew the dental problems he was having amounted to an excessive risk to his health or safety.

For the foregoing reasons, the complaint is subject to dismissal in its entirety for failure.

The Sixth Circuit has held that a district court may allow a prisoner to amend his complaint to avoid a *sua sponte* dismissal under the PLRA. *LaFountain v. Harry*, 716 F.3d 944, 951 (6th Cir. 2013); *see also Brown v. R.I.*, 511 F. App'x 4, 5 (1st Cir. 2013) (per curiam) ("Ordinarily, before dismissal for failure to state a claim is ordered, some form of notice and an opportunity to cure the deficiencies in the complaint must be afforded."). Leave to amend is not required where a deficiency cannot be cured. *Curley v. Perry*, 246 F.3d 1278, 1284 (10th Cir. 2001) ("We agree with the majority view that sua sponte dismissal of a meritless complaint that cannot be salvaged by amendment comports with due process and does not infringe the right of access to the courts."). In this case, the Court concludes that Hamer should be given an opportunity to further amend his complaint.

In conclusion, the Court DISMISSES Hamer's complaint for failure to state a claim on which relief can be granted, pursuant to 28 U.S.C. §§ 1915(e)(2)(B)(ii) and 1915A(b)(1). However, Hamer is GRANTED leave to file an amended complaint. Any further amendment must be filed on or before April 15, 2019. Hamer is advised that an amended complaint will replace the original complaint and previous amendments and must be complete in itself without reference to those prior pleadings. The text of the amended complaint must allege sufficient facts to support each claim without reference to any extraneous document. Any exhibits must be identified by number in the text of the

amended complaint and must be attached to the complaint. All claims alleged in an amended complaint must arise from the facts alleged in the original complaint and prior amendments. Each claim for relief must be stated in a separate count and must identify each defendant sued in that count. If Hamer fails to file an amended complaint within the time specified, the Court will assess a strike pursuant to 28 U.S.C. § 1915(g) and enter judgment.

IT IS SO ORDERED.

s/ **James D. Todd**
JAMES D. TODD
UNITED STATES DISTRICT JUDGE